Public Prosecutor v Chew Yoo Choi

HIGH COURT (KUALA LUMPUR) — FEDERAL TERRITORY CRIMINAL CASE NO 58-20-86
FAIZA TAMBY CHIK JC
12 DECEMBER 1989

Criminal Law — Dangerous Drugs — Trafficking in — Presumption of trafficking — Weight of drugs — Quantitative and qualitative tests — How much of specimen must be tested — Working order of measuring instrument — Weights and Measures Act 1972, s 37(j) — Dangerous Drugs Act 1952, s 39

Evidence — Search list — Amounting to confession — Break in chain of evidence — Custody of exhibits — Inference to be drawn — Dangerous Drugs Act 1952, s 37A — Evidence Act 1950, s 114(g)

Evidence — Custody of exhibits — Break in chain of evidence — Adverse inference — Evidence Act 1950, s 114(g)

The accused was charged with having trafficked in 16.59g of heroin which was found in a house where the accused had been arrested. The heroin seized was placed in the custody of a senior police officer before their production in court. This senior police officer was never called to give evidence.

Held, acquitting the accused:

(1) There had been a break in the chain of evidence concerning the custody of the heroin seized. This gave rise to an adverse inference against the prosecution's evidence. The prosecution's failure to call evidence to fill this gap was fatal and could not be cured by inviting the defence to supplement the prosecution's case by calling the witnesses offered.

(2) The tests on the heroin seized were inadequate for the purposes of the Dangerous Drugs Act 1952. The seized drugs should have been tested in their totality and not by sample.

(3) There was no evidence that the samples used for testing had been calibrated against any known standard of heroin. Neither was any evidence adduced to show that the instrument used to measure the samples was in good working order.

(4) There was no evidence that any coning or quartering had been done when the samples of drugs had been tested. There was grave doubt therefore on the chemist's findings on the total weight of heroin seized and the accused was given the benefit of this doubt.

(5) The search list which the accused signed for the heroin found was tantamount to a confession. As no caution had been administered to the accused, the heroin set out in the search list became inadmissible.

Cases referred to

1 *Mohd Osman bin Pawan* v *PP* [1989] 2 MLJ 110 (folld)
2 *Abdullah Zawawi* v *PP* [1985] 2 MLJ 16 (folld)
3 *PP* v *Lim Mung Shaing* (FTCT 24/85) (unreported) (folld)
4 *Sia Soon Suan* v *PP* [1966] 1 MLJ 116 (folld)
5 *Teoh Hoe Chye* v *PP*; *PP* v *Yeap Teong Tean* [1987] 1 MLJ 220 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(j), 39B
Weights and Measures Act 1972 s 27(1)

Halifah bte Daud (Deputy Public Prosecutor) for the Public Prosecutor.

Gurbachan Singh Pannu (*Kartar Singh* with him) for the defendant.

Cur Adv Vult

Faiza Tamby Chik JC: The accused was charged as follows:

> That you on 9 April 1986, at about 11pm at the house No 108, Jalan 56/26, Taman Sri Rampai, Setapak, in the Federal Territory, Kuala Lumpur, did traffic in dangerous drugs to wit heroin weighing a total of 16.59g and that you have thereby committed an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and punishable under s 39B(2) of the same Act.

In this case, the dangerous drugs were found in a double-storey terraced house at No 108, Jalan 56/26, Taman Sri Rampai, Setapak, Kuala Lumpur, on 9 April 1986 at about 11pm by a team of police headed by Inspector Nordin bin Abdul (PW3). The dangerous drugs were found:

(1) lying on the floor of the bathroom in the master bedroom in a plastic packet which the chemist (PW1) said contained on analysis 1.47g of heroin (P4);
(2) lying on the floor of the common bathroom a yellow plastic packet with the words 'Rakyat Super Store Sdn Bhd' written on it (P22) and inside this packet was a plastic packet which the chemist said contained on analysis 1.52g of heroin (P6);
(3) lying on the floor of the common bathroom also were 9 small plastic packets (P8 A-I) which the chemist said contained on analysis 12.13g of heroin (P9);
(4) lying on the floor at the entrance (muka pintu) of the second bedroom a plastic packet which the chemist said contained on analysis 1.47g of heroin (P12).

However, upon the evidence adduced in court, I find that the prosecution's evidence falls short of a prima facie case at the end of the prosecution's case. There are several aspects of the evidence given by the prosecution's witnesses which taken individually and cumulatively raised a real doubt in my mind.

To begin with, the evidence adduced by the investigating officer of the case, Inspector (now ASP) Baktiar bin Bustami (PW7), was far from satisfactory. In point of fact, his testimony shows not only the cavalier manner in which the incriminating items — which forms the material particulars of the charge — were handled but also the informal and easy manner by which he deposed to the facts of the case which leaves in my mind the shoddy investigation of the case that would bear close scrutiny:

(1) he testified that he received one plastic packet containing 58 empty plastic packets; whereas in his testimony, PW3 — the leader of the raiding party — said that he recovered one plastic packet (P24) containing 50 empty plastic packets (P25 1-50) and that

he separately recovered eight empty plastic packets (P25 A-H);

(2) he testified that he sent two weighing scales (P14 and P17) to the chemist on 14 April 1986 at about 3pm; whereas the chemist (PW1) in his testimony said that he received P14 and P17 on 14 April 1986 at 11.10am;

(3) he testified that the weighing scale (P17) in the yellow receptacle (P16) was put in envelope A and the weighing scale (P14) in the blue receptacle (P13) was put in envelope B; whereas the chemist (PW1) in his testimony said that he found the weighing scale (P17) in the yellow receptacle (P16) was in envelope B and the weighing scale (P14) in the blue receptacle (P13) was in envelope A;

(4) he testified that after receiving all the exhibits in envelopes E, F, G, J, A and B from the chemist, he put them in a steel safe in the CAD office in Jalan Kia Peng, Kuala Lumpur, and locked the safe and gave the key to the steel safe to his 'Pegawai Turus' who, he said, was his superior. It must be inferred and the inference is correct that the moment he handed the key to the safe to this 'Pegawai Turus', he immediately lost control and custody of the incriminating exhibits in envelopes E, F, G, J, A and B as the investigating officer of the case. His explanation was that his superior's safe was stronger than the one he had. One must remember it makes no difference as both safes were located inside the CAD office and the keys to these safes were in the hands of senior police officers, and there is no doubt at all in my mind senior police officers are responsible officers. Therefore in the light of these circumstances, I can reasonably infer that his superior, this 'Pegawai Turus', had access to those incriminating items in envelopes E, F, G, J, A and B, and until and unless this 'Pegawai Turus' was called to give evidence the safety of the non-innocent items in these envelopes remained suspect. In a serious case such as this, it is pertinent to emphasize again that investigation officers should not treat the custody of exhibits lightly so as to leave a gap in the chain of evidence relating to the exhibits before their production in court. (See *Mohd Osman bin Pawan* v *PP*[1] at p 112.)

In consequence of this, I am forced on this score in this regard to draw an adverse inference under s 114(g) of the Evidence Act 1950 for the prosecution's failure to call this 'Pegawai Turus' to testify.

The practice of making available a witness or witnesses from whom statements have been taken is to prevent the defence from commenting upon the honesty of the prosecution and thus invoking the often-quoted presumption of adverse inference under s 114(g) of the Evidence Act. But where the prosecution's evidence falls short of proving a prima facie case at the end of its case, the right not to call such witness/witnesses and to make him/them available to the defence will be of no avail. If the doubt consists of the gap arising out of the matters adumbrated earlier, the prosecution must close this gap. It is not for the defence to call the offered witness/witnesses to supplement the prosecution's case.

(See *Abdullah Zawawi* v *PP*[2] at p 18-19.)

(5) he testified that the name of the owner of the house No 108 where the accused was arrested was Liew Siew Fung whereas his actual name was Liew Fah Sang who gave evidence in this trial as prosecution witness No 6. Bearing in mind that it was the investigating officer who located this man Liew Fah Sang, the least he could do when giving evidence in court was to remember his name or he could have refreshed his memory by referring to his official pocket diary;

(6) he testified that he received two copies of the chemist report from the chemist (PW1) and that he did not serve any copy of the chemist report on the accused but just obtained the accused's signature on 2 September 1989 which is four days before the trial began at the lockup in this High Court; whereas the chemist in his testimony said that he gave the investigating officer (PW7) three copies of the chemist report on 29 May 1986 at about 11am; and when questioned by learned defence counsel 'why did you do that? This was another dishonesty, was it?', the investigating officer replied, 'I agree';

(7) the prosecution's evidence positively showed that there were two requests vide Police Form 31 sent to chemist. When shown the first request Police Form 31, the investigating officer (PW7) said 'Yes, this was the first Form 31.'

Q (defence counsel): The report in this evidence did not show you recovered two weighing scales?

A (investigating officer): Yes.

Q: If you had completed the Police Form 31 on 10 April 1986, you would have sent it on 11 April 1986, but because you filled the other one later on, ie after 11 April 1986, you sent this one on 14 April 1986?

A: True.

Q: In the second Police Form 31 there is mention of two weighing scales?

A: Yes

Hence, the recovery of the two weighing scales where traces of heroin were found could be looked upon with suspicion, especially when they were sent to the chemist three days later.

In a serious case such as this, the adducing of evidence as to the exhibits should be done with circumspection. Here no steps were taken in ensuring the exhibits were not tampered with. No evidence was led as to what the 'Pegawai Turus' did with the exhibits before they

were brought to court three years and four months later.

Then there is one aspect of the evidence adduced by the prosecution which called for comment. It is this. Inspector (now ASP) Hasnan bin Hassan (PW5), a member of the raiding party who was together with Inspector Nordin bin Abdul (PW3), the leader of the raiding party, in his testimony-in-chief as to when the incriminating items were first found said he saw:

(1) a packet on the floor of the bathroom in the master bedroom containing powdery substances suspected to be heroin. Yet, when he was shown exh P4 by the learned DPP, Cik Hafilah Daud, PW5 did not identify the packet despite the markings on the exhibit. PW5 just said, 'Yes, it looked like it';
(2) nine packets scattered on the floor of the second bathroom suspected to be heroin. Yet, when he was shown exh P8 A-1 by the learned DPP, PW5 did not identify those packets despite the markings on them. PW5 just said, 'Yes, looked like them';
(3) one plastic packet inside a yellow plastic packet on the floor of the second bathroom suspected to be heroin. Yet, when he was shown exh P6 by the learned DPP, PW5 did not identify the packet despite the markings on it. PW5 just said, 'Yes, more or less looked like it';
(4) a packet lying on the floor at the entrance (muka pintu) of the bedroom opposite the master bedroom containing substances suspected to be heroin. Yet, when shown exh P11 by the learned DPP, PW5 did not identify the packet despite the markings on it. PW5 said, 'Yes, empty packets like these'.

Another aspect is that PW5 testified in-chief that the substance was powdery in form. Yet, when asked by learned defence counsel 'when you saw these incriminating items they were in granular form?' PW5 answered, 'Yes, small granular form'.

The defence has seriously challenged the evidence of Lim Kong Boon (PW1), the government chemist, who carried out the tests and analyses on the substances handed to him.

In his testimony-in-chief, PW1 said that on 11 April 1986 at about 3.30pm he received from PW7 four envelopes marked E, F, G and J which were sealed with PDRM 403. In return, PW1 gave PW7 an acknowledgment receipt (P2). PW1 examined these exhibits and found them to comprise:

(1) envelope E (P3):
one plastic packet containing 6.54g (net) of pinkish granular (powdery) substances which on analysis he said he found the pinkish granular powdery substance to contain 1.47g of heroin. PW1 stated that it had been powdered during analysis and after which it was sealed in a separate plastic packet (P4);
(2) envelope F (P5):
one plastic packet containing 6.44g (net) of pinkish granular (powdery) substance which on analysis he said he found it to contain 1.52g of heroin. PW1 also stated that it had been powdered during analysis and after which it was sealed in a separate plastic packet (P6);
(3) envelope G (P7):
nine plastic packets containing a total of 52.53g (net) of pinkish granular (powdery) substances (P8 A-1) which on analysis he said that he found them to contain 12.13g of heroin. PW1 also stated that the substances inside the nine plastic packets had been powdered during analysis and after which they were sealed in a separate plastic packet (P9);
(4) envelope J (P10):
one plastic packet containing 6.46g (net) of pinkish granular (powdery) substance which on analysis he found it to contain 1.47g of heroin. PW1 also stated that it had been powdered on analysis, and after which it was sealed in a separate packet (P12). But when exh P12 was shown to PW7, the investigating officer of the case, by learned defence counsel on the fourth day of the trial, ie 11 September 1989, he stated under cross-examination that it was still granular in form contradicting what the chemist had earlier stated that 'it had been powdered on analysis' and sealed in a separate plastic packet.

It is interesting to note that the prosecution produced the original plastic packet contained in envelope J (P10) in evidence and marked it as exh P11 (the empty original plastic packet), whereas the original plastic packet contained in envelope E (P3) and the original plastic packet contained in envelope F (P5) were never produced in evidence at all.

PW1 stated under cross-examination that he came to the conclusion of 16.59g by calculation using a formula, ie calculating it by using instruments — gas chromatography. He stated that it was not done by weighing. PW1 admitted under cross-examination that even by using gas chromatography there would be an error to the maximum of 1.42% but added that this has been taken into account. PW1 also stated that traces of heroin found in envelope A (P13) and envelope B (P16) were insufficient for quantitative test but sufficient for qualitative test.

Under cross-examination, PW1 also stated that although he was aware of the presumption under s 37(j) of the Dangerous Drugs Act 1952, he did not rely on it. He further stated under cross-examination that he did a 100% analysis on the traces of heroin found on the weighing scale, but of the other exhs P3, P5, P7 and P10, PW1 took a representative sample from a homogeneous substance in P4, P6, P9 and P12 by using a blender. Therefore, PW1 said that he did not do a 100% analysis but used a total of

about 4g only. For qualitative analysis, the amount taken was not weighed, but for the quantitative analysis PW1 said that he actually weighed it to four decimal places of a gram. PW1 said under cross-examination that for qualitative test he used around 3g and for quantitative test he used around the remaining 1g. The total weight of the so-called pinkish granular (powdery) substance in envelope E (P3), in envelope F (P5), in envelope G (P7) and in envelope J (P10) was 71.97g, out of which 4g were taken for analysis and of which 3g were for qualitative test and 1g for quantitative test. Section 37(j) of the Dangerous Drugs Act 1952 talks of samples of contents of not less than 10% of such receptacle. In this case, they are P3, P5, P7 and P10; and if the analysis established by such samples are all of the 'same nature and description', then the presumption under s 37(j) arises.

Therefore, his tests and analyses could not be safely relied upon. It is inadequate. Surely, as far as quantitative test is concerned, by using just 1g out of a total of 71.97g to find out the weight of the heroin present in the so-called pinkish substances is certainly not conclusive. PW1 said the method he used was by obtaining sample as a representative of the whole substances. But this is using a scientific method known as coning and quartering, ie sample obtained by this method as representative of the whole content. And the chemist (PW1) did not describe this. He said he used an instrument gas chromatography. He also said he did not rely on s 37(j). Therefore without relying on the presumption, he must examine the pinkish substances in their totality, ie the whole 71.97g, not by testing a sample which is 4g out of the total content which is 71.97g. Therefore there is grave doubt about his tests and analyses.

Now PW1 testified that he came to the conclusion of 16.59g of heroin by using a calculating machine known as gas chromatography, but there was no evidence of the samples taken from envelopes E, F, G and J are being calibrated against a known standard of heroin. There was no evidence that the gas chromatography instrument is in good working order before the tests and analyses were carried out in accordance with reg 27(1) Weights and Measures Act 1972, which states:

> It shall be the duty of the head of the department concerned to arrange for all weights, measures and instruments for weighing or measuring used by his department to be examined by the Inspector once in every year, and no such weight, measure or instrument for weighing or measuring shall be used unless it has been passed as fit for use and stamped during the current year.

There is no evidence by the chemist that he did any coning or quartering on the samples and, more pertinently, the chemist did not state that the remaining pinkish substance left untested and unanalysed were of the 'same nature and description' as those samples (4g) which he had tested and analysed.

In the light of the circumstances that the accused was charged for trafficking of 16.59g of heroin being 1.59g more than the statutory weight stated in s 37(da)(1) of the Dangerous Drugs Act 1952, and in the light of the totality of the evidence adduced by the chemist, I come to the conclusion that there is a grave doubt on the findings arrived at by the chemist for his tests and analyses. And this is the main weakness in the prosecution's case at the prima facie level.

I might as well add that in a borderline case such as this, it is all the more important that the chemist ought to do either one of these: to carry out a 100% test and analysis or to comply strictly to s 37(j) of the Dangerous Drugs Act 1952; in either of these cases in these borderline cases, details of the findings must be adduced clearly in evidence by the chemist personally in court.

As the forensic evidence was full of inadequacies in this case, I do not consider that the court could confidently hold that there was a case against the accused. There is doubt in the prosecution's case and this doubt must therefore be extended to the accused. As the forensic evidence forms the main plank in the prosecution's case against the accused, I consider this infirmity has left the prosecution's evidence falling short of a prima facie case. The evidence of the chemist was inadequate and unreliable. There was no proper coning and quartering done. In fact, the heroin in P12 was still in granular form until today.

Here, the accused was put under arrest immediately after the finding of 1.47g of heroin which is exh P4 in the bathroom of the master bedroom, and later he was made to sign a search list (P48) which listed out, among other things, including P4:

(1) P6 (1.42g of heroin found on the floor of the second bathroom);
(2) P9 (12.13g of heroin found on the second floor of the second bathroom);
(3) P12 (1.47g of heroin found on the floor at the entrance (muka pintu) of the second bedroom).

And all these P6, P9 and P12 became the subject-matter of the charge. These exhs P6, P9 and P12 in P48 are clearly prejudicial to the accused because manifestly the very charge against the accused in this trial stems from these 15.02g (the contents of P6, P9 and P12) found in P5, P8 A-J and P11. And without the total weight of the heroin found in these exhibits (P6, P9 and P12), the charge under s 39B(1)(a) could not be sustained.

Therefore this document — which is the search list (P48) — with the accused's signature on it is tantamount to a confession by the accused and could be construed as implicating him in a material particular as it could be inferred that he was in possession of the offending items in question. As the accused had already been arrested (and

this was admitted under cross-examination by PW3 who stated that at that time the accused's freedom was already restrained) when the incriminating exhibits (P6, P9 and P12) were found and as no caution was administered to him in compliance with s 37A of the Dangerous Drugs Act 1952, these exhibits (P6, P9 and P12) became inadmissible in evidence.

As I have pointed out in the case of *PP* v *Lim Mung Shaing*[3] in para 26:

> It might be argued that the signature of the accused was by way of acknowledgment of receipt of the search list (exh P6). But in this case this fact was not clear. Exhibit P6 states: 'Acknowledgment of receipt by occupant'. These words were equivocal. It could be argued that 'receipt' of what 'by occupant'? Surely, if it was meant to be the receipt of exh P6 itself, it could be acknowledged by some other clear means; surely not by putting the accused's name and signature on exh P6 itself. Because by doing so the search list (exh P6) became a written statement by the accused that the offending items were found in his possession. And as I stated above, exh P6 with the accused's signature on it amounts to a confession by the accused that he was in possession of the non-innocent items in question.

Having regard to the fact which I have held aforementioned, that on scrutiny the testimonies of the chemist, Mr Lim Kong Boon (PW1), Inspector (now ASP) Hasnan bin Hassan, a member of the raiding party (PW5), and the investigating officer of the case Inspector (now ASP) Baktiar bin Bustami (PW7) which were at variance, it could not be said faithfully that the prosecution has established a prima facie case against the accused.

This is a criminal trial of an accused on a charge which on conviction carries only one punishment provided in law, that is the mandatory death sentence under s 39B(2) of the Dangerous Drugs Act 1952. Therefore the court should not indulge in conjectures and possibilities as Ong Hock Thye Ag CJ (as he then was) said in *Sia Soon Suan* v *PP*:[4]

> The requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else.

Per Abdul Hamid CJ Malaya (as he then was) in *Teoh Hoe Chye* v *PP*; *PP* v *Yeap Teong Tean*[5] at p 229:

> We would observe at this point that the law is clear in that 'it is unnecessary to call evidence to ensure that there is no break in the chain of evidence'. (See *Su Ah Ping* v *PP* [1980] 1 MLJ 76.) But where a doubt as to the identity of an exhibit arises a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal in the prosecution case.

In the instant case, there was such a failure. In the light of the aspect of the evidence given by the prosecution's witnesses PW1, PW5 and PW7 in the circumstances I have just denoted, I am of the view that it has raised a real doubt in my mind, especially so when those incriminating items were recovered from the various places and locations in the house No 108.

Accordingly, I find the accused not guilty of the charge. I therefore acquit and discharge him without calling for his defence.

Accused acquitted.

Solicitors: *Bachan & Kartar.*

Reported by *Mathavan Devadas*